

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 6, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1023**

**Cir. Ct. No. 2011CV409**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**MARK A. HARVEY,**

**DEFENDANT-APPELLANT,**

**V.**

**FRANK J. AND MARY F. MILLER FAMILY TRUST, DAVID MILLER,  
SUCCESSOR TRUSTEE AND BARBARA A. HENDRICKS,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Washington County: TODD K. MARTENS, Judge. *Reversed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Mark A. Harvey bought a house from the Frank J. and Mary F. Miller Family Trust. Harvey had to replace the well just months after

the closing. The circuit court dismissed Harvey's breach-of-contract claim against the Trust at summary judgment. We conclude that several issues present jury questions. We reverse.

¶2 The purchase contract's well system inspection contingency required the Trust to provide Harvey no later than fifteen days before closing a report of the well's and pressure system's functioning. The Trust had no right to cure any identified defects. Harvey asserts that at closing he received only a paid invoice from the well tester, J.R.'s Excavating, Inc. The invoice indicated that the first testing was halted when the well ran dry and that two days later J.R. replaced the well-pump system with a larger, more deeply placed pump. Harvey claims he relied on the invoice as evidence that any well problems had been remedied. Within months, Harvey had to replace the well due to inadequate water flow. He commenced this action, alleging breach of contract.

¶3 The Trust moved for summary judgment. The circuit court concluded that, since Harvey could have insisted on the report—the contingency required, any reliance on the invoice was not reasonable and his decision to go ahead with the purchase amounted to a waiver of the Trust's breach of the contingency. The court granted the motion. Harvey appeals.

¶4 We review de novo the grant or denial of summary judgment, employing the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12). In deciding if genuine issues of material fact exist, we draw all reasonable inferences in favor of

the non-moving party. *Metropolitan Ventures, LLC v. GEA Assocs.*, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58.

¶5 Waiver involves “the voluntary and intentional relinquishment of a known right.” *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 681, 273 N.W.2d 279 (1979). “[T]he intent to waive may be inferred as a matter of law from the conduct of the parties,” but “it is to be determined as a question of fact where the inference does not conclusively arise as a matter of law.” *Christensen v. Equity Coop. Livestock Sale Assn.*, 134 Wis. 2d 300, 303, 396 N.W.2d 762 (Ct. App. 1986) (citation omitted).

¶6 We recognize that buyers are required to exercise reasonable diligence and cannot “close their eyes to means of information readily accessible to ascertain the facts.” See *Kanack v. Kremski*, 96 Wis. 2d 426, 432, 291 N.W.2d 864 (1980). But whether a plaintiff has exercised reasonable diligence ordinarily is a question of fact to be determined by the fact-finder. *Sawyer v. Midelfort*, 227 Wis. 2d 124, 157, 595 N.W.2d 423 (1999). One reasonable inference is that Harvey foolishly failed to query the Trust about the whereabouts and contents of the report or even whether one was done, especially since the well contingency—added to the contract at his behest—gave him every right to walk away. Another is that the information in the invoice was sufficient to plausibly allay concern about the well.

¶7 The affidavit J.R. supplied in support of Harvey’s opposition to the Trust’s summary judgment motion averred that J.R. gave the Trust a copy of the four-page report; the report stated that water pressure was weak. Harvey contends that, in violation of the duty of good faith and fair dealing the Trust owed him, the Trust provided just enough information to lull him into a false sense of security.

Thus, a third reasonable inference is that the Trust substituted the invoice for the report to dupe Harvey. Whether good faith exists presents a question of fact. *See Amoco Oil Co. v. Capitol Indem. Corp.*, 95 Wis. 2d 530, 542, 291 N.W.2d 883 (Ct. App. 1980).

¶8 The facts here do not establish either unreasonable reliance or intent to waive as a matter of law. We therefore conclude that summary judgment was not proper.

*By the Court.*—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

